

FRANK AIRWAY INCORPORATED

ALASKA STATE BOARD OF EQUALIZATION
ASSESSMENT, ET AL.

THE STATE OF ALASKA

STATEMENT AS TO JURISDICTION

WILLIAM J. [illegible]
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 476

BRANIFF AIRWAYS, INCORPORATED,

vs.

Appellant,

NEBRASKA STATE BOARD OF EQUALIZATION AND
ASSESSMENT, ET AL.

JURISDICTIONAL STATEMENT

This statement is made in pursuance of Rule 12, Paragraphs 1, 2, and 3, as amended April 6, 1942. This statement and a copy of Rule 12(3) were served upon the defendants-appellees on October 14, 1953, with all other appeal papers required by the Rules, the Order Allowing Appeal having been signed and entered by the Chief Justice of the Supreme Court of Nebraska on October 14, 1953, which was within the ninety-day period provided by law for obtaining such order.

Opinion Below

The appeal is from the final Opinion, Judgment and Decree of the highest court of the State of Nebraska, which is the Supreme Court of Nebraska, this cause being designated

below as Number 33260 entitled Mid-Continent Airlines, Inc., versus Nebraska State Board of Equalization and Assessment, et al. The case goes forward on appeal as Braniff Airways, Incorporated, plaintiff-appellant, in accordance with stipulation of parties, Mid-Continent Airlines having merged with Braniff Airways in August, 1952, during the pendency of the litigation.

The Opinion, Judgment and Decree (designated as the all-inclusive term, "opinion") was filed and entered and became final on July 17, 1953, no other proceedings permissible in said cause on and after twenty days from said date. The mandate has been stayed pending the outcome of this appeal to the Supreme Court of the United States in accordance with order of the Chief Justice of the Supreme Court of Nebraska. The official opinion is reported in 157 Neb. 425, 59 N. W. 2d 746.

The action below was instituted as an original action for declaratory judgment in the Supreme Court of Nebraska. The sole question involved was the federal question of whether or not certain tax laws of the State of Nebraska, which became effective in 1950, were repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States. The decision was in favor of the validity of the statutes and against the claim of repugnancy. The said Opinion, showing upon its face the federal question involved and its disposition, is referred to and made a part of this Jurisdictional Statement and marked "Appendix A." In the Assignment of Errors application is made on this appeal to reverse this Opinion upon the grounds of its repugnancy to the said Article I, Section 8, Clause 3 of the Constitution of the United States.

Jurisdiction

Title 28, United States Code, Section 1257(2), states that a cause such as this may be reviewed by the Supreme Court of the United States "by appeal where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There was drawn in question specifically and directly the aforesaid Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Cl. 3), and indirectly for comparative purposes Article I, Section 9, Clauses 5 and 6, and Section 10, Clauses 2 and 3, and specifically and directly the invalidity, for that reason, of Sections 77-1244 to 77-1250, R. R. S. 1943. Copy of these statutes which were drawn directly in question is attached hereto as Appendix B.

Question Presented

The question presented is whether or not the final Opinion, Judgment and Decree (Appendix A) of the Supreme Court of Nebraska should be reversed because the above-designated state ad valorem taxing statute (Appendix B) is in conflict with and repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States. The plaintiff-appellant presents the question that the State of Nebraska, under and by virtue of said state statutes, seeks to levy an ad valorem tax upon the aircraft of the plaintiff-appellant, even though admittedly said airplanes come into and leave Nebraska solely in pursuit of interstate commerce. The State of Nebraska is neither the home port nor the state of creation of plaintiff or its predecessor, Mid-Continent Airlines, Inc.

Thus, it is apparent from the Opinion (Appendix A) and the statutes (Appendix B) that the position of the plaintiff-appellant is in conflict in no way with the decision of this

Court in *Northwest Airlines, Inc. v. State of Minnesota* (1944), 322 U. S. 292, 64 S. Ct. 950. Nor is it in conflict with *Ott v. Mississippi* (1949), 336 U. S. 169, 69 S. Ct. 432, nor *Standard Oil Co. v. Peck* (1952), 342 U. S. 382, 72 S. Ct. 309, nor any other decision of the Supreme Court of the United States, as more particularly will be seen from the following Statement.

Statutes and Constitutional Provisions Involved

United States:

Constitution, Article I, Section 8, Clause 3.

Article I, Section 9, Clauses 5 and 6.

Article I, Section 10, Clauses 2 and 3.

Title 28, U. S. C., Sec. 1257(2).

Title 49, U. S. C., Ch. 9—Civil Aeronautics Code:

Subchapter I, Definitions, Sec. 401; Declaration of Policy, Sec. 402; Public Right in Transit, Sec. 403.

Subchapter II, Organization of Board, Sec. 421-427.

Subchapter III, Powers and Duties of Administrator, Sec. 451-60.

Subchapter IV, Air Carrier Economic Regulation, Sec. 481-96.

Subchapter V, Nationality and Ownership of Aircraft, Sec. 521-24.

Subchapter VI, Civil Aeronautics Safety Regulation, Sec. 551-60.

Subchapter VII, Air Safety, Sec. 581-2.

Subchapter VIII, Other Administrative Agencies, Sec. 601-3.

Subchapter IX, Penalties, Sec. 621-23.

Subchapter X, Procedure, Sec. 641-9.

Subchapter XI, Miscellaneous, Sec. 671-85.

Subchapter XII, Security Provisions, Sec. 701-5.

Subchapter XIII, War Risk Insurance, Sec. 711-22.

Title 49, U. S. C., Ch. 14—Federal Aid for Public Airport Development; Ch. 16—Development of Commercial Airport.

House Report No. 2709; Text of Act, Vol. 1, 1950, p. 1063, for "Federal Airport Act."

Also same reference, Vol. 2, p. 3998, for House Report 3038; Text of Act, Vol. 1, p. 1084, "To Promote the Development of Improved Transport Aircraft."

Nebraska:

Ch. 77, R. R. S. 1943, Sec. 1244 to 1250; statute involved copied in full, Appendix B.

Statement

Attached to this Jurisdictional Statement as Appendix C is a Stipulation of Facts entered into by the parties hereto and duly filed in the Supreme Court of Nebraska as the factual basis for the decision. From a reading of the Stipulation of Facts of the parties and the facts set forth in the Opinion of the Court, it is apparent that:

(a) The appellant's aircraft were in the State of Nebraska solely and exclusively while engaged in loading and unloading freight, passengers, and mail coming into Nebraska through the air from outside the state, landing within the state for the sole and only purpose of unloading or loading passengers, freight, and mail, then ascending immediately into the airways above Nebraska and departing in those airways from the State of Nebraska in pursuit of its interstate flights.

(b) The Court found that "it is not disputed that plaintiff's operations are interstate in character."

(c) Nowhere in the stipulated facts or in the findings of the Court is there justification for the conclusion that the aircraft in question attained a taxable situs in the State of Nebraska or that said aircraft were within the State of Nebraska for any time or purpose except while engaged in interstate commerce.

(d) The Court found that "plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are fourteen of such flights in and out of

Omaha each day and four such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short durations, generally from five to twenty minutes."

(e) The Court found, in accordance with the Stipulation of Facts (Appendix C), that Mid-Continent Airlines was organized under the laws of the State of Delaware with its home port at St. Paul, Minnesota. In August, 1952, Mid-Continent merged with the plaintiff-appellant, Braniff Airways, Incorporated. Braniff Airways, Incorporated, was organized and exists under and by virtue of the laws of Oklahoma. The main offices of Mid-Continent Airlines had been in Kansas City, Missouri, but were moved after the consolidation to Dallas, Texas. For purposes of repair, storage, and similar purposes all the aircraft go to the airport at Minneapolis-St. Paul, Minnesota. The State of Nebraska is neither the home port nor the state of creation of the plaintiff-appellant or its predecessor, Mid-Continent Airlines. From the Stipulation of Facts (Appendix C) it is seen that all the aircraft in question must return for purposes other than interstate flight to a port of registration, Minneapolis-St. Paul, for inspection, storage, repairs, and governmental certification.

(f) From the Stipulation of Facts it appears that only the aircraft engaged in interstate commerce are the subject matter of taxation under the Nebraska taxing statutes involved herein, and that said aircraft come into Nebraska and depart therefrom over regularly assigned aerial highways that are under the sole jurisdiction of the Federal Government, acting through the Civil Aeronautics Board; that all control, direction, and movement of the aircraft are under governmental jurisdiction at all times, even while landing and taking off in the State of Nebraska.

(g) The Stipulation of Facts further discloses that four of fourteen aircraft move in intrastate commerce in Nebraska between Omaha and Lincoln. This consists of a stopover at Lincoln by some of the aircraft

while en route to and from Omaha, Nebraska, but this transportation is carried on while the air craft themselves are engaged in interstate commerce in and out of the State of Nebraska. Any local business taxed is not the subject matter of this lawsuit (Sec. 77-1244(1) and 1246, Appendix B).

All these facts are set forth with exactness in the Stipulation of Facts (Appendix C), to which reference is made as if copied verbatim at this point in the Statement.

The Questions Involved Are Substantial

1. The ad valorem tax levied upon the plaintiff-appellant's air craft is based upon a valuation of those aircraft in accordance with the apportionment formula set forth in the Act. (Appendix B). Any ad valorem tax upon the sole and only instrumentality of an operator in interstate commerce raises a substantial question of the burden which said tax places upon the instrumentality, and, if the tax statute is found to be repugnant to the Commerce Clause of the Constitution of the United States, the element of the fairness or unfairness of the method of valuation for such tax is secondary in importance.

2. If the Nebraska statute is upheld as a valid exercise of the taxing power of the State against air carriers engaged solely in interstate commerce within the State, it obviously will have its effect as a precedent throughout the United States and the aircraft industry as a whole.

3. The Stipulation of Facts shows that the plaintiff-appellant at Omaha, Nebraska, pays upwards of \$22,000 a year for the privilege of landing at the Omaha Municipal Airport and, in addition, pays for certain depot rental facilities, janitor service, light, heat, and power that is used. It also pays a gasoline tax aggregating more than \$14,000 a year for gasoline bought for and used in propelling its aircraft in and out of the State of Nebraska. In addition, it pays an

ad valorem tax upon all its property that has attained a taxable situs within Nebraska, such as office furniture, office equipment, and other property that remains within the State of Nebraska.

4. It is apparent that the question is substantial, when Congress has stated in the Civil Aeronautics Act, Sec. 403, Title 49 U. S. C.:

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.”

This is followed by a complete congressional preemption of the field of aviation in all its activities, as more particularly set forth in the sections of the Civil Aeronautics Code above cited. Consequently, an ad valorem tax upon air carriers is an attempted regulation by the State, in defiance of the Commerce Clause (under which the Civil Aeronautics Code may be effectively administered without interference), by casting a burden of ad valorem taxation upon the air carriers.

5. Substantial questions are involved when it appears that the State of Nebraska claims it may tax the air carrier a reasonable amount upon the equipment used in pursuit of interstate commerce “within and through” the State. A substantial question in reference to all aviation is that when an aircraft, fully equipped for flight, comes into and goes out of the State solely for the purpose of landing and discharging its passengers and cargo at a particular airport and then immediately departs, and pays for such privilege, such activity has been considered by the State of Nebraska as attaining a taxable situs within the State, and the State considers that the allocation formula set forth in the statute may be applied as a test for the valuation of the aircraft.

6. Questions of substance are involved when it is apparent from the opinion (Appendix A) and from the Stipulation of Facts (Appendix C) that the pronouncements of the Supreme Court of the United States, through the Justices thereof, are in conflict with the objective of the Nebraska taxing statute (Appendix B). The opinion in *Northwest Air Lines v. Minnesota* (1944), 322 U. S. 303, 64 S. Ct. 950, states:

“Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

* * * *

“Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L. Ed. 254; *City of St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Morgan*

v. Parham, 16 Wall. 471, 21 L. Ed. 302; cf. Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 S. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205. I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again.

“What, then, remains as a basis for Minnesota’s claim to tax this entire fleet of planes at their full value as property of the State of Minnesota? They have been within the state only transiently and in the same manner in which they have been in many states: to serve the public and to be serviced. The planes have received no ‘protection’ or ‘benefit’ from Minnesota that they have not received from many others. It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. But no distinction whatever can be pointed out between those extended by Minnesota and those extended by any state where there is a terminal or a stopping place.”

See, also, *Rosenhan v. U. S.* (1942), 131 F. 2d 932 (cert. denied).

7. Substantial questions are involved when it appears from the Opinion and the Stipulation of Facts that Congress alone shall have the right to levy a tax upon the aircraft in question and that it has not delegated that authority to the State of Nebraska. The views of plaintiff-appellant are that Congress could not divest itself of that exclusive right.

8. The State of Nebraska has undertaken by the taxing statute in question to circumvent that constitutional provision by asserting that it has the right, in the manner set forth in the statute (Appendix B), to tax an aircraft based upon the State’s own method of evaluating the aircraft when it comes into and departs from the State of Nebraska

in pursuit of commerce among the several states. The people of the United States, constantly using the air carriers in interstate commerce, and the industry will be affected adversely to their respective interests in the event the Nebraska taxing statute is permitted to stand as a valid exercise of the taxing power of a state in reference to such air carriers.

9. It is respectfully submitted that this High Court has jurisdiction to hear this cause on appeal and, under the facts and law appearing from the Stipulation of Facts (Appendix C) and the Opinion (Appendix A), should note jurisdiction, and, upon hearing, reverse the Nebraska ad valorem taxing statute upon the grounds that it is repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States.

WILLIAM J. HOTZ,
WILLIAM J. HOTZ, JR.,
ROBERT M. KANE,
Counsel for Appellant.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF NEBRASKA

MID-CONTINENT AIRLINES, INC., now Braniff Airways,
Incorporated,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
ET AL.

No. 33,260

Filed July 17, 1953

1. Taxation: Constitutional Law. Statutes providing for the levy of an *ad valorem* personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state.

2. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

Original action. Action dismissed.

William J. Hotz, William J. Hotz, Jr., William F. Dalton, and Robert M. Kane, for plaintiff.

Clarence S. Beck, Attorney General, and C. C. Sheldon, for defendants.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

CARTER, J.:

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the statutes authorize the assessment, levy, and collection of an *ad valorem* personal property tax against plaintiff's flight

equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the provisions of Title 49, U. S. C. A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and

passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of 2½ cents a gallon on gasoline used which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air

carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate carriers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which came into the state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*,

316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereon in compelling the carrier to pay the taxing state more than

its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it within any announced rule that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of their value, if it is fairly related to their use within the taxing state. The over-all result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operated to exempt them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do so unless, possibly, evidence of a tax situs in other states would have called for a different result; in any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been

different if it had been shown that there was a taxable situs in other states or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were operated on no fixed schedules but the turn-arounds were made as quickly as possible. They remained long enough to unload and take on cargo and to make necessary and temporary repairs. The State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

In the subsequent case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number

of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The Peck case distinguishes *Northwest Airlines, Inc. v. Minnesota*, supra, on the basis that it was not shown in the latter case that " 'a defined part of the domiciliary corpus' had acquired a taxable situs elsewhere." The further statement in the Peck case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile", appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the *Northwest Airlines* case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned and the system of taxing it at the place at which it is used and by whose laws it is protected when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this case is relied upon in the *Ott* and *Peck* cases is clear. For reasons stated in the *Pullman's Palace Car Company* case, we think the inland water transportation cases are particularly applicable. The court in the *Pullman* case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are

recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23; *Smith v. Turner*, 7 Howard 282, 12 L. Ed. 702; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 St. Ct. 714, 50 L. Ed. 1155; *Union Tank Car Co. v. McKnight*, 84 F. 2d 421; *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and transportation systems. Others are based on facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, *Northwest Airlines, Inc. v. Minnesota*, *supra*, and *Standard Oil Co. v. Peck*, *supra*, which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, section 9, clause 6, and Article I, section 10, clause 3, of the Constitu-

tion of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff. We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, section 8, Clause 3, Article I, section 9, clause 6, or Article I, section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

Dismissed.

APPENDIX "B"

PERTINENT SECTIONS OF THE STATE STATUTES INVOLVED

CHAPTER 77

REVENUE AND TAXATION

RSN 1943, Reissue of 1950

77-1244. *Personal property; taxation of air transportation carriers; definitions.* As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver or as-

signee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266 § 1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77.1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided,

that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within the state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property; taxation of air transportation carriers annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner a report, in such form as may be prescribed by the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Law 1949, c. 231, § 1, p. 641.

77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment;*

levy. The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in section 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

APPENDIX "C"

STIPULATION OF FACTS—Filed February 26, 1953

IN THE SUPREME COURT OF NEBRASKA

General Number 33260

MID-CONTINENT AIRLINES, INC., a Corporation, *Plaintiff*,
v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
et al., *Defendants*

1. Plaintiff is a corporation, organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in said state. The principal object of its incorporation was and is the owning and operating of airplanes as carriers by air of persons and property for hire. From other states it operates its planes for such purposes on regularly scheduled stops in and out of the State of Nebraska. All its planes are fully equipped for flight through the air and are designed and constructed to descend from the air above to an airport built for the landing and taking off of such aircraft. Two such landing fields have been provided for such purpose in Nebraska, one by the

municipality of Omaha, and one by the municipality of Lincoln. At these air fields plaintiff neither owns nor maintains hangars for reconditioning, overhauling, repairing, or storing aircraft, its engines, or any of its flight equipment.

2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destinations in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the overhaul base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft which are not at the overhaul base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specified cities.

3. Since July 15, 1951, the plaintiff has been authorized by the Civil Aeronautics Administration of the United States, for a trial period of three years, to land at the airport at Lincoln, Nebraska, on two southbound flights through Omaha while en route to Missouri and points beyond, and on two flights from Missouri while en route to Omaha and points in other states to the north. Consequently, persons and property may be loaded on such flights at Omaha for Lincoln and at Lincoln for Omaha.

4. Mid-Continent Airlines and Braniff Airways, Incorporated, which were consolidated effective about August 1, 1952, operate 7,336 unduplicated route miles over the air lanes, serving sixty communities in the United States plus Latin American and Mexican routes.

5. The plaintiff operates fourteen flights through Omaha, Nebraska, as above stated, as follows:

Mid-Continent Airlines, Incorporated Flight Data

Listed below are all the scheduled flights of Mid-Continent Airlines as operated through Omaha, Nebraska. This data

gives the originating station of each flight and the arrival and departure times into and out of Omaha, Nebraska, showing the next scheduled stop beyond Omaha, Nebraska.

These flights are separated into southbound and northbound flights.

Southbound

Flight Number

23. Originates in Omaha, Nebraska, 7:00 a. m., arriving in Lincoln, Nebraska, 7:27 a. m., flying non-stop to St. Joseph, Missouri, then to Kansas City, Missouri and St. Louis, Missouri. Equipment used on this flight leaves Minneapolis/St. Paul, Minnesota, 7:00 p. m. the evening before and arrives in Omaha, Nebraska, 9:55 p. m., after scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa.

395. Originates in Minneapolis/St. Paul, Minnesota, 7:25 a. m., making scheduled stops at Sioux Falls, South Dakota and Sioux City, Iowa, arriving in Omaha, Nebraska at 9:47 a. m. This flight leaves Omaha 10:07 a. m., flying non-stop to Kansas City, Missouri, then to Tulsa, Oklahoma, and Houston, Texas.

39. Originates in Minneapolis/St. Paul, Minnesota, 11:30 a. m., with scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa, and arrives in Omaha, Nebraska, 2:25 p. m. This flight leaves Omaha 2:40 p. m., flying non-stop to St. Joseph, Missouri and then to Kansas City, Missouri.

97. Originates in Minneapolis/St. Paul, Minnesota, 2:30 p. m., flying non-stop to Omaha, Nebraska, arriving 4:14 p. m. This flight leaves Omaha 4:29 p. m., flying non-stop to Kansas City, Missouri and to Houston, Texas.

9. Originates in Minneapolis/St. Paul, 4:15 p. m., with scheduled stops at Watertown, Huron, and Sioux Falls, South Dakota; and Sioux City, Iowa, and arrives in Omaha, Nebraska, 8:37 p. m. This flight departs from Omaha 8:52 p. m. and arrives in Lincoln, Nebraska, 9:19 p. m., leaving Lincoln, 9:24 p. m., flying non-stop to Kansas City, Missouri.

319. Originates in Minneapolis/St. Paul, 8:50 p. m., flying non-stop to Omaha, Nebraska, arriving 10:09 p. m.

This flight leaves Omaha 10:29 p. m., flying non-stop to Kansas City, Missouri.

Northbound

Flight Number

16. Originates in Kansas City, Missouri, 7:40 a. m., flying non-stop to Omaha, Nebraska, arriving 8:45 a. m. This flight leaves Omaha 9:00 a. m., flies non-stop to Sioux City, Iowa, and then to Sioux Falls, Huron and Watertown, South Dakota; and terminates in Minneapolis/St. Paul, Minnesota.

18. Originates in Kansas City, Missouri, 9:15 a. m., flying non-stop to Omaha, Nebraska, arriving in Omaha 10:20 a. m. This flight leaves Omaha 10:35 a. m., flying non-stop to Minneapolis/St. Paul, Minnesota.

4. Originates in Kansas City, Missouri, 12:15 p. m., stopping in St. Joseph, Missouri, arriving in Lincoln, Nebraska, 1:36 p. m. This flight leaves Lincoln 1:41 p. m., arriving in Omaha 2:08 p. m. This flight leaves Omaha 2:23 p. m., flying non-stop to Sioux City, Iowa.

302. Originates in Kansas City, Missouri, 2:45 p. m., flying non-stop to Omaha, arriving 3:35 p. m. This flight leaves Omaha, 3:50 p. m. and flies non-stop to Minneapolis/St. Paul, Minnesota.

381. Originates in St. Louis, Missouri, 3:30 p. m. after stopping in Kansas City, Missouri and St. Joseph, Missouri, it arrives in Lincoln, Nebraska 6:41 p. m. This flight leaves Lincoln 6:46 p. m., and arrives in Omaha, 7:13 p. m. This flight leaves Omaha 7:28 p. m., flies non-stop to Sioux City, Iowa and then to Sioux Falls, South Dakota, and Minneapolis/St. Paul, Minnesota.

300. Originates in Kansas City, Missouri, 5:30 p. m., and flies non-stop to Omaha, Nebraska, arriving 6:20 p. m. This flight leaves Omaha, Nebraska 6:40 p. m., flying non-stop to Minneapolis/St. Paul, Minnesota.

322. Originates in Kansas City, Missouri, 9:45 p. m., flying non-stop to Omaha, Nebraska, arriving 10:35 p. m. This flight leaves Omaha, 10:55 p. m., flying non-stop to Sioux City, Iowa and Sioux Falls, South Dakota and then on to Minneapolis/St. Paul, Minnesota.

Daily Aircraft Time in Nebraska as Compared
with Total System Aircraft Time

	Flight No.	Nebraska Time		Total
		Air	Ground	
1. Southbound	23	1:09	:05	1:14
2.	395		:20	:20
3.	39		:15	:15
4.	97		:15	:15
5.	9	1:09	:20	1:29
6.	319		:20	:20
7.	7		9:05	9:05
8. Northbound	16		:15	:15
9.	18		:15	:15
10.	4	1:09	:20	1:29
11.	302		:20	:20
12.	38	1:09	:20	1:29
13.	300		:20	:20
14.	322		:20	:20
Total		4:36	12:50	17:26
System Total (27 x 24:00)				648:00
Ratio—Nebraska to System				2.70%

Eight aircraft operate the above schedules in normal rotation.

6. Miles traveled by passengers originating and terminating in Nebraska compared with system passenger miles—July 15, 1951, to January 31, 1952:

Passenger Miles of Passengers Originat- ing and Terminating in Nebraska	Passenger Miles Mid-Continent System	Ratio of Nebraska to System
39,215	84,605.029	.046%

7. Revenue derived from passengers originating and terminating in Nebraska as compared with system passenger revenue—July 15, 1951, to January 31, 1952:

Passenger Revenue of Passengers Originat- ing and Terminating in Nebraska	Passenger Revenue Mid-Continent System	Ratio of Within Nebraska Income to System Income
\$2,404.68	\$4,750,440.09	.051%

8. The mileage is ninety miles from Lincoln, Nebraska, to the state's border near Rulo, Nebraska, and it takes forty-two minutes to fly that distance. There are four such flights daily. Most of the flights, being those in and out of Omaha, Nebraska, take off and enter the state in a matter of seconds

because the Omaha airport adjoins the Missouri River, which is the state boundary, and the flights come over the river and go out over the river to and from other states, except the flights above described to Lincoln since July 15, 1951. Each aircraft is on the ground at the airport to load and unload passengers and freight from five to twenty minutes, except the one flight per day leaving Minneapolis at 7:00 p. m., arriving in Omaha at 9:55 p. m., leaving Omaha at 7:00 a. m., arriving in Lincoln at 7:27 a. m., and from there the plane goes to points in Missouri and south in interstate commerce.

Summary of Carriage of Persons and Property
between Lincoln and Omaha, Nebraska
July 15, 1951, to January 31, 1952

	Mail Pounds	Express Pounds	Freight Pounds	Number of Passengers
In Nebraska	11,906	5,319	4,864	713
System total	2,084,447	1,362,379	1,946,824	262,075
Ratio	.571%	.390%	.250%	.271%

9. Plaintiff's main executive offices were in Kansas City, Missouri, and are now in Dallas, Texas, owing to a consolidation of Mid-Continent Airlines, Inc., with Braniff Airways, Incorporated, which took place on or about August 1, 1952. Braniff Airways is a corporation organized and existing under the laws of the State of Oklahoma with its corporate place of business at Oklahoma City in said state and with its main executive offices at Dallas, Texas, and is organized for the same objects and purposes as plaintiff. Accordingly, the caption in this cause shall be "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," versus the defendants named. The defendants as named in the caption are the proper party defendants in this action.

10. The home port of plaintiff is and at all times mentioned herein has been at the Minneapolis-St. Paul airport, known as the Wold-Chamberlain Air Field, where plaintiff maintains repair shops, machinery, equipment, and hangars. To this port each of the aircraft, with all its flight equipment that alights from the air above Nebraska and ascends into the air from Nebraska, must be flown at designated times for governmental inspection, repairs, maintenance,

tests, overhauling, and storage when not in use. None of such home port facilities were or are located in Nebraska. All aircraft of plaintiff must be returned to said home port at Minneapolis-St. Paul for governmental inspection and overhauling and relicensing before a period of fifty hours has expired on the engines and plane under the Civil Aeronautics Administration rules, under the authority of the Civil Aeronautics Code (49 USCA Ch. 9, § 401-705).

11. The plaintiff's aircraft are flown through the air within the limits of aerial highways, specifically described and assigned by the United States Civil Aeronautics Administration to the plaintiff. Said aerial space is so described and outlined by said Administration as the fixed air lanes in which plaintiff's ships are required to fly when going from state to state into and from Nebraska. Said Administration issues, upon examination, the licenses for the aircraft, its engines, propellers, and all its flight equipment, including radio and all communication devices from and to the aircraft. Likewise, the Administration licenses the pilots and all personnel engaged in flight. All aircraft, engines, radio, communication apparatus, and flight equipment must fly to the Minneapolis-St. Paul home port of plaintiff, where all are located.

12. At the Omaha Municipal Airport the federal government, acting through said Administration, has constructed and maintains an airport traffic control tower at which there is stationed a chief airport controller and eleven assistants, all of whom are employed and paid by the United States at a payroll expense of about \$50,000 per year. This personnel and the equipment used are so stationed for the purpose of directing and controlling aircraft coming into or departing from the Omaha airport. Each aircraft of plaintiff coming into the airport receives, when about ten minutes out from Omaha, preliminary landing instructions, and is told by the government controller which landing runway to use and is given the traffic pattern, or may be instructed not to land. These government aircraft controllers at the Omaha airport are likewise in constant communication with other major aircraft control towers

spaced throughout the parts of the United States directing flight in the air lanes through which plaintiff's planes are licensed and restricted to fly and from which they may descend and ascend in pursuance of their government licensed course and government approved schedules. These federal air lanes are laid out across the country and normally connect major air terminals. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priority authority. Radio facilities are provided by the government along these air lanes to direct all air traffic from one point to another. For planes not equipped with radio, the government provides and operates a radio beam. Also about each twenty miles on the ground are electrically operated beacons indicating that the designated air lane is above that light.

13. All violations of rules and regulations of the Civil Aeronautics Administration or of the Civil Aeronautics Code may be reported to the Administration by any person concerned. Violations of landing and take-off regulations at an airport in Nebraska or elsewhere are by law federal offenses under the Civil Aeronautics Code. Such violations are punishable as by the law provided in the federal courts. (49 USCA § 560, 610(a), 623; 61.306, 60.18(c) of Civil Air Regulations.)

14. The plaintiff's aircraft, which land from the air lanes above and take off into them from the Nebraska airports, are each engaged as federally licensed air carriers of mail, persons, and property between the States of North Dakota, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Nebraska, Colorado, Missouri, Oklahoma, Arkansas, Tennessee, Louisiana, Texas, and now Mexico and South America.

15. At the close of the year 1951 the total operating revenue of plaintiff (Mid-Continent) was \$9,818,363. Total operating expense was \$9,508,859. Net profit after taxes was \$135,941. The revenue miles flown were 9,556,459. The revenue passengers carried were 441,115. The pounds of mails and cargo carried were 10,200,000.

16. The gross income from passengers for 1951 was

\$7,681,760.80; from mail, \$1,608,590.65; from freight, express, and excess baggage, \$331,261.23; from chartered planes and other transportation, \$171,037.96; and from miscellaneous sources, \$25,712.68. Total for 1951, \$9,818,363.32.

17. Capitalization (Mid-Continent): Common stock issued and outstanding, 418,755 shares par value \$1.00; debentures due May 1, 1954, \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; May 1, 1963, \$1,000,000.

18. Plaintiff pays approximately \$22,000 per year for depot rental space, landing fees, and other facilities at the Municipal Airport in Omaha.

19. In addition to the \$22,000 per year, the plaintiff pays two and a half cents per gallon tax on gasoline fuel supplied to its aircraft at Omaha. In 1951, 567,000 gallons were taken on in Omaha, resulting in a net tax to the State of Nebraska of \$14,180.00.

20. The personal property of plaintiff, such as office furniture and equipment, auto trucks, and all similar property, is taxed in Douglas County. Also such property would be taxed in Lancaster County, if any such property is there located. In Douglas County this tax is \$200 to \$300 per year. Comparable amounts are paid in other municipalities in other states where the aircraft land and take off.

21. In a return made by plaintiff to the defendant Board for taxation for 1950, 9% of the total was given as the proper per cent of revenue originating in Nebraska based on ticket sales, and 11½% of the total system tonnage originated in Nebraska for 1950.

22. The plaintiff made out and filed its return under forms furnished by the defendant Tax Commissioner for 1950, and the assessment was as follows. The Mid-Continent Airlines assessment for 1950 was compiled by the defendant Tax Commissioner from forms filled out, signed, and returned by the plaintiff. The tax for 1950 was \$4,280.44, and it remains unpaid. The defendants fixed as the valuation figure \$118,901.00 for plaintiff's flight equipment for Nebraska. The rate of levy was 36 mills, resulting in the

tax of \$4,280.44 for 1950. The valuation was determined by the Tax Commissioner as follows:

Airline Assessments 1950

Mid Continent Airlines

1. System Value Formula

A. Five Year Average Net Operating Income Capitalized at 6%	\$5,484,350
B. Five Year Ave. Mkt. Value of Stocks and Bonds	3,927,634
C. Book Value Depreciated Cost Basis	707,864
Average of A, B, and C or System Value	3,373,283

2. Flight Equipment Apportionment Formula

A. Ratio of Flight Equipment Cost (Sec. B) to Total Operating Property Cost (Sec. F) ..	1,771,360	61.1%
	2,899,660	
B. Ratio of Depreciated Cost Value of Flight Equipment (Sec. C) to Depreciated Cost Value of Total Operating Property (Sec. F) ..	237,322	33.5%
	707,864	
Average of A and B or Apportionment Factor		47.3%

3. Allocation Formula

A. Ratio of Arrivals and Departures within Nebraska to Total Arrivals and Departures ..	10,306	9.032
	114,104	
B. Ratio of Revenue Tons Handled in Nebraska to Total Revenue Tons Handled	8,008	11.541
C. Ratio of Revenue Originating within Nebraska to Total Revenue	69,389	9.235
	537,894	
	5,824,803	
Average of A, B and C or Allocation Factor		9.936

4. Allocated Value (Result of System Value \times Apportionment Factor \times Allocation Factor $3,373,283 \times 47.3 = 1,595,563 \times 9.936 = 158,535$)

5. Equalized value $\$158,535 \times 75\% = \$118,901$

23. For the year 1951 the plaintiff failed to file the return, and defendants accordingly used the same ratio formulae for 1951 as returned for 1950, changing only the mill levy from 36 to 38, which was the average levy throughout the whole state for 1951. The mill levy is obtained by the defendants' computing the total amount of property taxes levied in the state and dividing that total by the total assessed valuation of property for the state, and that resulted in the mill levy of 36 and 38 respectively, for 1950 and 1951. For the year 1951 the tax assessed was \$4,518.29, which re-

mains unpaid. These taxes are drawing interest and penalties as by law provided.

24. The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessors in the county in which the base is located.

25. The State Tax Commissioner, in Assessing plaintiff's aircraft and arriving at the ratios and the resulting tax, followed the state statutes which the Attorney General advised were applicable, and used the unit rule to arrive at the whole system value, and then used the statutory ratios to determine the valuations for Nebraska. It is these sections of the Nebraska law that are now under attack as unconstitutional under the Federal Constitution, as set forth in the petition on file herein. The defendants' position is made clear by their answer on file herein. The taxing statutes in question are copied herein as follows:

CHAPTER 77

REVENUE AND TAXATION

RSN 1943, Reissue of 1950

77-1244. *Personal property; taxation of air transportation carriers; definitions.* As used in section 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver, or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, § 1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77-1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period: Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within the state

for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property; taxation of air transportation carriers; annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner a report, in such form as may be prescribed by the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1, p. 641.

77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy.* The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

26. The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants in intrastate to interstate business carried on by the plaintiff in Nebraska.

27. The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Dated at Omaha, Nebraska, February 24, 1953.

MID-CONTINENT AIRLINES, INC.,
CORPORATION,

Plaintiff;

(S.) by WILLIAM J. HOTZ,

HOTZ & HOTZ,

Its Attorneys,

1530-5 City National Bank Building,

Omaha 2, Nebraska;

Dated at Lincoln, Nebraska, February 26, 1953.

NEBRASKA STATE BOARD OF
EQUALIZATION AND ASSESS-
MENT, ET AL.,

Defendants;

By CLARENCE S. BECK,

Attorney General;

(S.) by C. C. SHELDON,

Assistant Attorney General.